WAS PANAMA "A CHAPTER OF NATIONAL DISHONOR"?

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In November, 1903, following promptly upon the final rejection of the Hay-Herran Convention by the Senate of the Republic of Colombia, an uprising against the central government of the Republic took place in what was then the Department of Panama. The actual rejection of the treaty was notified to the United States Government by the Colombian Minister to the United States on August 22d, but the Colombian Senate remained in session until October 31st considering the general question of a Canal Treaty. On that date it adjourned; having taken no step toward a further treaty, but postponing all consideration of the subject to the next meeting of its Congress a year later, October 31, 1904.

On November 3d came the Panama revolt. The day before this occurrence, November 2d, the United States Government, which had abundant warning that an outbreak was imminent upon the rejection of the treaty, had telegraphed its naval officers on both sides of the Isthmus to maintain free and uninterrupted transit; to occupy the line of the railroad, if necessary; and to prevent the landing of any armed force, government or insurgent, at any point within fifty miles of Panama. On November 6th the Republic of Panama, having been declared independent by the insurgents, was recognized as an independent state by the Government of the United States. On November 13th the minister by it appointed was received officially by President Roosevelt; and on December 18th was signed a new Canal Treaty with the new state. This treaty followed the main lines of that which Colombia had rejected; but the Canal Zone was

widened from six miles to ten, and the powers of the United States within it were enlarged.

The course of President Roosevelt in these transactions not only was marked by a rapidity and decisiveness which might be characterized as precipitate, but it secured results extremely advantageous to the United States. Naturally therefore the immediate impression produced was equally precipitate, and such as commonly follows where action unusual in kind and seemingly hasty coincides with self-interest. The act was looked upon as dictated only by considerations of profit, and as such was weighed in the balance of untested first impressions as to legality and obligation. The prepossessions thence arising have continued to prevent a clear and unprejudiced weighing of the arguments of legal and illegal; or of those of right and wrong, which do not always coincide with law. Yet an act profitable to oneself may be not only upright, but proper.

In such cases, however, there is an evident necessity that a due respect to the opinions of mankind should lead to a cogent exposition of the reasons for the action taken. Such an exposition was given by President Roosevelt in his annual message to Congress of December 7, 1903, and in a special message of January 4, 1904. A similar exposition was given by Mr. John Hay, then Secretary of State, in his correspondence with General Reyes, the envoy sent by Colombia to remonstrate against the whole course of the United States attendant upon the Panama revolt. It is to be observed that Mr. Hay, while undoubtedly approving the President's action, was in no official sense responsible for it. All executive responsibility centers in the President, and in him alone. The approval of Mr. Hay, therefore, carries with it the full weight of his known character for probity, moderation, and ability, undiminished by the element of self-defense inseparable from personal accountability.

This is the more important to be observed because the strenuousness of Mr. Roosevelt's character communicates itself to his speech and writings; the vigor of which, when exerted in necessary self-justification, tends rather to confirm the first impression of indefensibleness produced by the transaction, as summarized above. This undoubtedly has intensified an opposition which has assumed itself to be distinctively and exclusively moral; which has repudiated as im-

possible any other standards than its own; and by confident asseveration has succeeded in determining a very general attitude of the public, as indicated in the press, at the mouth of which most men take most of their opinions irreflectively. It seems, therefore, not unfit to subject the matter anew to an analysis based mainly upon the official papers, which probably few have read and fewer studied. This is the more desirable because Mr. Roosevelt's action has been condemned recently and unqualifiedly by so respectable a citizen as Dr. Leander Chamberlain,* whose article I have occasion to think was considered unanswerable by an eminent lawyer.

Dr. Chamberlain's paper may be described as an impassioned arraignment of the United States, concentrated upon the person of Mr. Roosevelt. It must be remembered that while the nation and its President are separate entities, and while the action of the one may be censurable in the same instance that that of the other is correct, it nevertheless remains true that the responsibility of the Chief Executive devolves upon the people, if by them his act is approved, explicitly or implicitly. Upon this it follows that examination must extend not only to the immediate steps and reasons of the national government in the particular instance, but also to such other facts as may or should condition the entire subsequent attitude of the nation. Nothing has been done by the country to redress or atone for the alleged wrong to Colombia. Therefore—not Mr. Roosevelt alone, but—the nation is at the bar; and the matter for examination is not only the specific step taken and reasons given by the Executive of the day, but also the actual conditions of every kind at the moment of action. These should influence the decision of the nation now as to its responsibility for existing conditions, and as to any reparation assumed to be due.

It is not my intention to take toward Dr. Chamberlain's article the defensive attitude of replying *seriatim* to his successive contentions. I shall adopt the more direct method of stating positively the justifying points of the case for the United States. It is, however, essential to note and to subject to brief comment three propositions which Dr. Chamberlain calls fundamental.

"Certain fundamental considerations must be taken into account in

* North American Review, February, 1912.

any worthy discussion of the conduct of governments. First, that diplomacy now stands committed to 'the extending of the empire of law and the strengthening of an appreciation of public justice.' Second, that 'international jurisprudence is based on the moral law and embodies the consensus of civilized peoples with regard to their reciprocal rights and duties.' Third, that 'all nations stand on an equality of rights,—the old and the new, the large and the small, monarchies and republics.' It is, accordingly, in view of these considerations that the Panama imbroglio of 1903 is to be judged."

As regards these positions, any one conversant with the general subject will recognize that they bristle with controversial points and definitions. The third is a commonplace, though necessary to be affirmed. As a sovereign state Colombia is the peer of the strongest and richest. Equally, however, she is liable like the strongest to be dealt with according to her deserts. As to the other two,—that "diplomacy stands committed, etc.," and that "international jurisprudence is based on the moral law, etc."—the reply is that the basis of international legal decisions is not the ideal that this or that man or men may cherish, but the existing status of law in universal, or at least general, acceptance. The legal basis of judgment is what the law is, not what it ought to be. We long for universal peace, we aim at it and strive for it; but in the present distress we base our preparations upon the serious fact that war, as a means of maintaining international balances, has not been disavowed, and that there is no present prospect of such disavowal. In short, the legality and the morality of the action of the United States are two separate factors, to be separately considered. The legality depends upon the actual state of international law, not on any theory of its derivation or basis. The morality of the transaction is to be treated upon moral grounds. In treatment the two must not be confused by passing loosely from one to the other. If illegal, the fact may impugn the morality of a measure; but the question of legality is separate and should be kept so.

The present writer has no personal record here to defend, unless it be the imputation likely to be made of a perverted moral twist of intellect and of conscience in believing the course of Mr. Roosevelt vindicable in international law; and still more justifiable in natural equity, as applicable either to the community of states embraced under the domain of that law, or to those nations and populations which still lie without its pale. In general discussion, most deal-

ings with this subject have proceeded on the facile assumption that relations between states not only can hereafter become a matter of pure legal determination,—which being a matter of prophecy or speculation may be left to one side,—but that they actually now are so determinable. This is not the case. In the conflicting relations of independent states a particular action may be lawful—legal—yet not expedient; it may be both lawful and expedient; or it may not square with exact law, yet be essentially just because possessing the highest degree of expediency, that, namely, of doing essential justice between all the parties concerned.

In the case before us the Senate of Colombia had an indisputable legal right to reject the treaty. The question must therefore be treated whether the United States had a strict legal right to take the precise steps it did when the Panama revolt affected the *status quo*. It will be similarly necessary to examine and adduce in due course both the legal and moral aspects; recognizing that a transaction may be justifiable from the one or the other standpoint, while not necessarily so from both.

As far as has come under my observation, the entire incident is treated as between Colombia and the United States only. The interest of Panama is never mentioned. This is much as if the intervention of the United States in Cuba, in 1898, should be regarded as a matter between the United States and Spain alone; and from conversation I am inclined to believe that this is the lawyer's point of view, so far as justification of our action is concerned. Yet it is notorious that the suffering of Cuba was a very large factor, not only in determining our intervention, but in justifying it. Now there certainly was not in the Panama district any suffering precisely comparable to that in Cuba; but there was and for three years had continued to be the distraction, misery, and prostration, incident to civil war, concerning which the Colombian envoy to Washington, General Reyes, alleged "the weakness and ruin of my country after three years of civil war scarcely at an end."* Of this war the Isthmus was a principal scene; the motive being resistance to the central government. The territory of Panama, said General Reyes again, "forms the most important part of the national wealth."† Yet, having this im-

* *A Digest of International Law*, by John Bassett Moore. Vol. iii, p. 90. Government Printing Office, Washington, 1906. † *Ibid.*, p. 82.

portance, it was really an outlying department, separated by long distance from the central government at Bogotá, and accessible only by sea, like Cuba. "It is known," wrote Reyes, "that there is no overland way to reach Panama with troops from the interior of Colombia."* This in truth was the sting of Mr. Roosevelt's order forbidding troops of either party to land within fifty miles of Panama. The measure was decisive. Was it also justifiable? This is perhaps the crucial point; for, given the rightfulness of the order, the rest follows up to the recognition of the new state, which must be defended or impeached on other grounds.

In the three preceding years the Isthmus had been constantly the scene of fighting. In 1900 there was continuous fighting about Panama, and British marines had to be landed to protect foreign interests. In 1901 severe fighting took place about Colon; both that city and Panama were seriously threatened by insurgent forces which in November captured Colon. It then became necessary to land American, British, and French naval forces at Colon, which finally was recaptured by the Colombian government.† All this imperiled the transit; for which the United States had made itself responsible and for the security of which it had become necessary at times to acquiesce in the intervention of European force, contrary to the known policy of the nation. These circumstances involved the United States directly in the troubles of Colombia; and if a new ownership of Panama would increase its security from disturbance, it would also affect favorably the treaty burden resting upon the United States. Therefore, the contingency of such occasion arising entered fairly into the contingent policy of the United States; the more so that the imminent probability of a revolt became known to it soon after the adverse action of the Colombian Senate upon the treaty was taken.

From this precedent knowledge it has been loosely inferred that the United States was in collusion with the authors of the revolt. It is well, therefore, to quote here Mr. Hay's explicit and categorical denial of such an insinuation made by General Reyes:

"Any charge that this government or any responsible member of it

* *A Digest of International Law*, by John Bassett Moore. Vol. iii, p. 83. Government Printing Office, Washington, 1906.

† *Encyclopædia Britannica*. Ed. 1910-11. Vol. vi, p. 712.

held intercourse, whether official or unofficial, with agents of revolution in Colombia is utterly without justification. Equally so is the insinuation that any action of this government prior to the revolution in Panama was the result of complicity with the plans of the revolutionists. The Department sees fit to make these denials, and it makes them finally."*

Even without this evidence, the prior knowledge of the United States Government, and the measures taken to be ready at once to meet a probable emergency in which its own interests or those of its citizens might be affected, could not fairly be construed as action accessory to the foreseen revolution.† Mr. Hay's denial is conclusive. The United States was not a participant, direct or indirect; but if trouble arose it would be a directly interested party, not merely an intervener from outside. It was interested, not only as formal guarantor of a security which Colombia had repeatedly failed to sustain, but also by an avowed national policy familiarly summarized as the Monroe Doctrine.

Further, this national policy had introduced the whole family of European states as parties interested in the canal treaties, and in the situation constituted by the rejection of the Convention. Gradually, step by step, the United States had advanced from a position of joint guarantorship with Great Britain, of any canal at the Isthmus, to that of claiming and demanding sole guarantorship for itself; and from an avowed willingness to see the enterprise aided by foreign capital to an equally avowed determination that only the United States should undertake the construction. Such exclusion of other nations by force—for force it was—necessarily entails an obligation to them that that which we forbade their undertaking for the general benefit should by us be accomplished without avoidable delay. How admirably this obligation has been discharged since the authority to do so was obtained from the new Republic of Panama is now a matter of history; not yet wholly finished, but already with a record which will remain historical.

It is possible that the full development of this particular element of the situation, which was constituted by our obliga-

* *A Digest of International Law,* by John Bassett Moore. Vol. iii, p. 91.

† As far back as 1856 President Pierce took similar contingent action. "I have deemed the danger of the recurrence of scenes of lawless violence in this quarter so imminent as to make it my duty to station a part of our naval force in the harbors of Panama and Aspinwall." (*Moore's Digest,* vol. iii, p. 37.) It is a frequent anticipative measure.

tion to the other Powers of the world, may not have passed through the mind of President Roosevelt, although in his messages there is clear recognition of an international obligation. But however partially or completely he may have worked out this specific conclusion, it is valid for the consideration of the nation in reviewing its own responsibility *now* for the action of its Chief Executive *then*. A right action may be doubly right for reasons which may not at the moment have occurred to the agent.

From what has been written, it appears to follow that the transactions, November 2–10, 1903, were no simple matter between Colombia and the United States, but complex. They involved our relations to other nations of the world and to the population of Panama as third parties. Panama was entitled to consideration as really as was Cuba in 1898. She was so entitled, partly because, although the United States was not under treaty obligation to repress domestic disturbance at the Isthmus, Panama was a principal sufferer from the conditions of disquietude which affected the transit; partly because Panama bore to Colombia much the same relation as Cuba to Spain, *viz.:* that of an outlying possession rather than of a contiguous and continuous territory. The impossibility of invasion except by sea substantiates this fact; and it is known that Bogotá is the capital because in the districts surrounding the city,—in the highlands of the interior,—is to be found the bulk of the white population, which at an early date withdrew thither from the hot and unhealthy climate of the coast. In that isolation they have preserved the language, manners, and physical characteristics of their Spanish ancestry, with all its defects and virtues, with less variation than any other Spanish-American state; and thence they governed the remote district of Panama. It is needless to remark how adverse to the interests of any community is administration by one so distant in time and in difficulty of access, as well as differing in racial characteristics. Whether or no such considerations were elaborated in the minds of President Roosevelt and his eminent Secretary of State, they remain factors for consideration by the people of the United States in estimating now the essential rectitude of a transaction for which they have become responsible by the approval of tacit sanction.

With this preliminary statement of facts and factors, I address myself now to the question of the technical legal

correctness of the action of the United States Government —of President Roosevelt—in forbidding the landing of Colombian armed forces, whether of the government or of the insurrection, within fifty miles of Panama. This was undoubtedly decisive of the issue of the insurrection. It need not have been followed by recognition of the new state. It was open to the United States to say to Panama: "We have insured quiet by excluding national troops. Now we require you to admit them peaceably and to recognize the authority of Colombia." By the exclusion the United States held the whole matter in its hands, and stood between the parties as umpire. The intervention—of the fifty-mile order —and the recognition are separate facts; and though in near sequence are not linked.

In a complicated transaction, questions of expediency and of legality blend and affect one another practically; but logically they are different, and in discussing either it is necessary to exercise so much mental effort as to exclude for the moment the one not immediately under consideration. As a matter of legal interpretation, under international law, forcible intervention in another country or between two contestant states is a legal right, in the sense that the nation exercising it contravenes no dictum of international law. Abstention from intervention in strictly domestic conflicts is the recognized rule; but it is equally recognized that it is a rule which may have exceptions. The act may be morally right or wrong; it may be expedient or inexpedient; but it is not illegal. By accepted law, in this, as in declaring war, the state is its own judge of right. This is the present status of international law. It is evident, indeed, that if a state is its own judge as to declaring war, it must be so in any minor exercise of force, although it equally has no legal right to interfere except that of force; the independence of each state forbidding by accepted principle the intrusion of other authority than its own, except that of force. Such a step, however, may become illegal in special cases where the intervening state by treaty has given up its general right in the specific instance. Barring treaty, the United States had a perfect legal right to intervene by force for Panama against Colombia; still more to intervene, in such measure as she deemed necessary, to preserve quiet in a transit in which she was nationally interested. The question remains, Had she by treaty abandoned this right?

The allegation is that she had done so by the treaty of 1846, in the thirty-fifth article of which occur the words now to be quoted, which I believe contain all the stipulation bearing upon this question of legality.

"The United States, in order to secure to themselves the tranquil and constant enjoyment of these advantages [before stipulated] and as an especial compensation for the said advantages, and for the favors they have acquired by the fourth, fifth, and sixth articles of this treaty, guarantee, positively and efficaciously, to New Grenada, by the present stipulation, the perfect neutrality of the before-mentioned isthmus, *with the view that the free transit from the one to the other sea may not be interrupted or embarrassed** in any future time while this treaty exists; and, in consequence, the United States also guarantee, *in the same manner,* the rights of sovereignty and property which New Grenada has and possesses over the said territory." †

It will be observed that these words contain two guarantees from the United States to Colombia (at that date called New Granada); 1, the perfect neutrality of the Isthmus; 2, the rights of sovereignty and property which Colombia possessed over it. It must be remembered again that we are dealing now with dry legal construction, not with the morality of any transaction whatever. Legal construction involves the interpretation of phraseology; and, where that is doubtful,—where the negotiators have failed clearly to express their meaning,—their purpose, when it is known or can reasonably be inferred, is a determining factor in reaching decision. Now, as Mr. Hay argued, the purpose of the United States in the treaty, in guaranteeing transit, and in guaranteeing possession, had reference solely to the need of the United States to use the Isthmus for transit in its broadest sense. The need had been brought closely home to our national consciousness in 1846 by the war with Mexico, in the course of which troops for the Pacific coast had to be sent by sailing-vessels around Cape Horn. General Sherman was one who made this trip, and was by it determined in favor of a canal.

For the above reasons the phraseology of the treaty where equivocal must be brought to the bar of this well-ascertained purpose of the United States, which entered the treaty with the express object of securing transit for herself, and, though incidentally only, for all other communities. Doubt as to the extent of the guarantee of neutrality

* These words are italicized as showing the particular object, motive, and reason of the treaty.

† *Moore's Digest,* vol. iii, p. 6.

did arise long antecedent to 1903. Colombia in 1865 had raised the question whether it extended to domestic insurrection, and whether in such case she could demand assistance to maintain neutrality. The United States decided in the negative. Mr. Seward, then Secretary of State, wrote:

"The purpose of the stipulation was to guarantee the Isthmus *against seizure or invasion by a foreign Power only.* It could not have been contemplated that we were to become a party to any civil war in that country by defending the Isthmus against another party. As it may be presumed, however, that *our object* in entering into such stipulation *was to secure the freedom of transit across the Isthmus,* if that freedom should be endangered or obstructed, the employment of force on our part to prevent this would be a question of grave *expediency,* to be determined by *circumstances.**

This is a case of interpretation, which not only implies doubt but explicitly rejects a meaning which the words nevertheless might bear. The interest of the United States being one of transit only, not in Colombia as a nation, she was bound to intervene against domestic seizure only when the security of her transit was endangered, of which she was the judge; the question being one of expediency, not of obligation. This conclusion is based upon the evident purpose of the United States in the negotiations. It is to be noted also that such intervention is not by Mr. Seward's words conditioned by a request from Colombia. The right of originating intervention is preserved by them. So Mr. Gresham, Secretary of State to President Cleveland, telegraphed in 1895: "If for any reason Colombia fails to keep transit open and free, as that Government is bound by treaty of 1846 to do, United States are authorized by same treaty to afford protection."†

The question immediately arises whether the phraseology of the other guarantee, that of "rights of sovereignty and property," is open to the same construction as confined to foreign interposition. "Seizure" of territory is a violation of "rights of sovereignty and territory." It will be observed that in the clause of the thirty-fifth article, quoted above, the words "in the same manner" occur. The United States guarantees the rights of sovereignty and property in the same manner as it guarantees neutrality of the Isthmus.

* *Moore's Digest,* vol. iii, pp. 37, 38. My italics.
† *Ibid.,* p. 43.

The words therefore are not to be pressed beyond the interpretation that the object of this guarantee, like that of the other, is security of transit for the United States, which might be endangered or interrupted by conquest or attack of an external enemy, American or European.

Under these conditions the United States in 1903 saw impending again the danger of the renewal of the civil war which, only recently ended, had for three years distracted Colombia and affected transit. This had necessitated frequent interposition of the United States for the security of transit; and had occasioned just that kind of national anxiety and possibility of political entanglements that arise from intestine quarrels in ill-organized countries with which a close political connection exists; whether the connection be of geographical nearness — as recently in Mexico — or of treaty, or of commercial relations. The Eastern question and the Cretan question may be cited appositely as illustrating the same kind of problem in Europe, with consequent international solicitudes; and also as accounting for the fixed policy of the United States that such questions in America shall not be permitted insensibly to draw in European states as active parties to the controversy of the Isthmus, a result to which frequent disturbances tend.

The case of 1903 having arisen, by the well-ascertained fact that preparations for revolt were being made upon the Isthmus if the Hay-Herran Convention were rejected, the question follows, Did the treaty of 1846, because guaranteeing Colombia's rights of sovereignty and property against foreign invasion, also bind legally the United States not to exercise her general international right of armed interference on behalf of her threatened interests? There was ample precedent for saying that she was not so bound, but was at liberty to act for the security of transit, which was her one specific interest in Colombian territory, to safeguard which the treaty had been made. The occasion not being one of foreign invasion, but of domestic disturbance, the treaty guarantees of enforcing the neutrality of the Isthmus, or of resisting a seizure did not apply. This position had been decided nearly forty years before by Mr. Seward. But, if the treaty did not apply, in other words was non-existent as regarded the case in hand, then the general right of international law sanctioning forcible intervention remained; to be determined, as Mr. Seward had then

said, by considerations of grave expediency governed by circumstances.

In other words, the treaty of 1846 not being applicable, the United States possessed an unimpaired international right to act as her interests demanded. A measure which should wholly bar all access by sea to the Isthmus was entirely within her legal competence. She had a legal right even to take a side, if she chose. She did not take a side, because neither Colombian nor Panama forces were to be permitted to land within fifty miles of Panama. Certainly, the particular circumstances caused this provision to strike the Colombian forces harder than the insurgents; yet it is quite conceivable that the latter might have received help from beyond sea, for the same has often occurred in similar rebellions. The obligations of neutrality, when they exist, concern only the action taken, not the results of the action. For example, a neutral state forbids its ports to furnish coal to either belligerent. Evidently the effect is worse to the one not possessing coaling-stations near by than to the one which may have such; but this result does not impeach the neutrality of the action.

The order to the United States naval officers not to permit a landing within fifty miles of Panama was therefore wholly within the legal competence of the United States. It insured the neutrality of the Isthmus; an expression which means simply that the territory shall not be permitted to be a scene of war. The result was that the insurrection was successful, and that the independence of the district of Panama was proclaimed by its people; that is, there was no resistance to the measure by the inhabitants of the district; neither by arms nor by protest. There was no apparent division of sentiment, such as existed in many of the seceding states of our Union in 1861; and it was natural that there should be none, because great interests of the residents were involved in a favorable solution of the canal question, which the action of the Colombian Senate, though perfectly legal, had postponed indefinitely.

The declaration of Panama independence could not but remain effective as long as the United States persisted in its fifty-mile order. Upon this order, in the judgment of the United States, depended the maintenance of tranquillity; so often disturbed of late years that it may fairly be said that a perpetual expectation of disturbance was the normal

condition. The question then arises, How far was the United States debarred legally by the treaty guarantee from recognizing a *de facto* situation, dependent upon an attitude she was determined to maintain? The Treaty of 1846 stipulated that the United States guarantees the rights of sovereignty and property of Colombia in the Isthmus "in the same manner,"—"positively and efficaciously,"—as it guaranteed the perfect neutrality of the Isthmus. Here again, Mr. Seward, in 1865, writing with no faintest prevision of the conditions of 1903, but envisaging an entirely different problem, expressed the understanding of the United States as to the obligations of the treaty. Mr. Seward's words were based upon the opinion of the then Attorney-General, which Seward adopted:

"Neither the text nor the spirit of the stipulation in that article, by which the United States engages to preserve the neutrality of the Isthmus of Panama, imposes an obligation on this government to comply with a requisition [like that above referred to]. The purpose of the stipulation was to guarantee the Isthmus against *seizure or invasion by a foreign Power only.**

Mr. Hamilton Fish, Secretary of State, in 1871, expressed a similar opinion:

"A principal object of New Grenada in entering into the treaty is understood to have been to maintain her sovereignty over the Isthmus against any attack *from abroad.* That object has been fully accomplished. No such attack has taken place, though this Department has reason to believe that one has upon several occasions been threatened, but has been averted by warning from this Government as to its obligation under the treaty."†

In the face of these utterances it seems evident that there is no ground whatever for the assertion upon which Dr. Chamberlain rests his impeachment of the action of 1903. Dr. Chamberlain writes:

"Since the paramount issue in the case of both the neutrality and sovereignty which the United States guaranteed was the safe-guarding of the transit, there was a valid implication that the United States, on due occasion and especially at New Grenada's request, would give aid against transit interference from any source whatever, whether foreign or domestic.‡

So far from a valid implication, there was on the part of the United States an explicit repudiation of such obliga-

* *Moore's Digest,* vol. iii, p. 48. My italics.
† *Ibid.,* vol. iii, p. 27. My italics.
‡ *North American Review,* February, 1912, p. 150.

tion; and as Colombia during the years since 1865 had acquiesced in this interpretation, by not denouncing the treaty, the understanding between the two governments was complete in this particular.

The seizure of the Isthmus in 1903 was not the act of a foreign Power, but of Colombian citizens; and the proclamation of independence was by the same body that effected the seizure. The seizure clearly was not of the character against which the United States by long precedent pronouncement had confined its guarantee; for it was not by foreign act, but by domestic. The sovereignty of Colombia had disappeared *de facto* before a domestic insurrection. The legal question then remaining was whether such act should be recognized by foreign states, and when. Recognition by a foreign state undoubtedly gives moral help to an insurgent, and it therefore should not be given lightly; but it is not legally operative between the parties at strife. In fact, recognition, as distinct from active aid, is not operative at all in establishing the independence of the new state, either legally or effectually. The United States dates its independence, not from the recognition by France and Spain in 1778, but from its own declaration, in 1776, as the legal origin. Great Britain did not acknowledge this independence nor cease from her efforts to subdue the United States because of the recognition by France and Spain; and these countries did not effect independence by recognition, though they subsequently did so by armed intervention in the quarrel.

By international law, recognition by a foreign state is legally discretional with that state; a matter of national policy, and of national determination as to time and circumstances. Ordinarily, the decision rests upon the establishment of a *de facto* government, ascertained to be so by organization and continuance; but there is no constraint in law that these two indications must be exacted, or that a *de jure* fact of the wishes and rights of the people may not determine the action of foreign states. The status of Crete since 1897,—not political independence, but political autonomy under the nominal suzerainty of Turkey,—is due to the action of the great Powers, expelling the Turks, after a series of revolts, as in Panama, had demonstrated that quiet could not otherwise be had.

I have tried so far to confine my consideration to the

strict letter of the law; to obligation, positive and negative, as involved in the treaty of 1846. Neither by temperament nor by conviction am I inclined ordinarily to exact the strict letter of the bond. I could not have sided decisively with either Shylock or Portia in their literal interpretations. But, as the subject under discussion presents itself to me, the question is whether the United States, by the specific undertakings of the treaty of 1846, had divested itself of its general rights under international law. The frequent assertion that the relations of states are as susceptible of legal definition and enforcement as those of individual men appears to me extravagant, as to both fact and reason; but I do hold that a treaty is a promise, and that its ascertained stipulations are obligations, not only legal, but moral, having the force of promise. In such case the determination of action depends upon ascertainment of the thing promised. No question of expediency, however plausible, not even of the welfare of a third party, is to me admissible, unless under circumstances so exceptional that none such occurs to me now. I certainly do not hold that any advantage to the United States or to Panama could be advanced to justify the action of 1903, if certainly in contravention of the treaty.

If not in contravention, then the United States had liberty to take any action she saw fit under her general international legal rights as a state. The question then was not one of law, but of morals; and, except in case of absolute right and wrong, morals in the case of nations—less frequently in that of individuals—is often a matter of expediency. "The greatest good of the greatest number" is a moral aim, to be guided by considerations of morality and of expediency. The right to property is not an absolute right; it is not unconditioned, but conditioned. Municipal law, therefore, permits deprivation of property for the good of the community. The measures of the United States caused Colombia to lose property. If the action which so resulted was legal, its rectitude otherwise is to be judged by moral considerations; and these are to be applied not to the facts of the moment only, but also to those anterior, if furnishing a continuous, consistent record. The good of the United States; the national self-interest, which singularly enough is considered by many the sole justifying reason for national interventions; the good of Panama; the good of

foreign states, American or non-American; the good—or evil—to Colombia herself; the obligations following upon a systematic policy pursued by the United States in years past, which not only reserved the canal control to herself alone, but insistently excluded all other Powers capable of such control; all these factors enter as considerations in deciding whether the course of the United States was proper. It is always to be remembered, as before said, that the question now is no mere criticism of a past action of a single man, but a determination whether the United States people have been and still are the perpetrators of an unatoned wrong.

Positions like the Isthmus of Panama cannot be considered on a footing merely of uni-state property. They belong essentially to the world, because the world has need of them. The accident of possession undoubtedly gives particular claims to consideration and remuneration; and both consideration and remuneration were tendered and accepted by the Hay-Herran Convention. To this the Colombian Senate opposed the Colombian Constitution as forbidding cession of sovereignty over national territory. Mr. Hay replied that the Convention actually secured such sovereignty, conceding to the United States only a limited control for police and sanitation, indispensable to the construction and management. The clause in the Convention to this effect, quoted by Mr. Hay, runs:

> "The United States freely acknowledges and recognizes this sovereignty [of Colombia] and disavows any intention to impair it in any way whatever, or to increase its territory at the expense of Colombia."*

In short, the United States required, not political sovereignty, but the administrative control of the ground to be occupied by a great industrial enterprise undertaken by it; just as any corporation requires control of its own grounds. This does not impair the rights of sovereignty, any more than a lease impairs the property rights of an owner.

In any case the constitution of a country is valid to itself alone; it is not a reply in international contentions. When Italians were executed by popular uprising in New Orleans, it was no reply to Italy that the Constitution of the United States left the central government no power to punish a

* *Moore's Digest*, vol. iii, p. 95.

crime committed in Louisiana. A street for the world needed to be opened through Colombian property; and Colombia could not present her constitution as a valid bar. Had immediate steps been taken to remedy the difficulty, something might be said for delay; but the Colombian Congress, without providing any bases for the reopening of negotiations, adjourned for a year, during which time the matter was "hung up." Not even a beginning at amendment would be made. Under such circumstances the "to-morrow" of Spanish tradition became portentous, and is a fair matter for present consideration as to the present accountability of the American people.

From limitations of space I refrain from considering the grosser pecuniary motives alleged to have influenced the Colombian Senate. That such were existent and operative will, I think, be the conclusion of those who will read attentively the messages of President Roosevelt and the correspondence of Mr. Hay and General Reyes. Though not necessarily determinative of moral judgment, because possibly not morally wrong in men making a bargain for their country, even if evidently narrow and shortsighted, the facts have a sinister appearance and bear upon the general verdict touching the moral propriety of the action of the United States. But there is another allegation, not against the Colombian Senate, but against the Executive who arranged the Hay-Herran Convention and submitted it as signed for the approval of the Senate. This I quote textually from Mr. Hay. After stating at length certain actions of the Colombian Government, which he claimed were in direct contravention of agreements in the treaty, which agreements had been accepted after full discussion of the points involved, Mr. Hay wrote:

"This state of affairs continued until General Fernandez, in charge of the ministry of finance [that is, Secretary of the Treasury to the Colombian Government], issued, more than a month before the Congress was convoked [in special session] and more than two months before it met, a circular to the Bogotá press, which, as Mr. Beaupré* reported, 'had suddenly sprung into existence,' inviting discussion of the convention. The circular in substance stated, according to Mr. Beaupré's report, that the [Colombian] government 'had no preconceived wishes for or against the measure'; that it was 'for Congress to decide,' and that Congress would be largely guided by 'public opinion.' In view of what the government had already done, it is not strange that this invitation to discussion was followed by violent attacks upon the convention, accompa-

* The American Minister to Colombia.

nied by the most extravagant speculations as to the gains which Colombia might possibly derive from its rejection." *

In brief, the Colombian Executive having after prolonged discussion entered into an agreement with the United States, sought itself to overturn this in popular opinion as conducive to rejection by the Senate. In this it succeeded. A public act of a Secretary of the Treasury is the act of the government of which he is part, unless by it repudiated. Although this measure in itself would not affect the moral obligation of the United States to act with due consideration of all interests concerned, it did effectively dispose of any claim of Colombia to special consideration as especially affected. Mr. Hay's comment on this transaction will commend itself, I think, to most men:

"Treaties are not definitely binding till they are ratified; but it is a familiar rule that, unless it is otherwise provided, they are binding on the contracting parties [in this case the two governments] from the date of their signature, and that in such case the exchange of ratifications confirms the treaty from that date. This rule necessarily implies that the two governments, in agreeing to the treaty through their duly authorized representatives, bind themselves, pending its ratification, not only not to oppose its consummation, but also to do nothing in contravention of its terms." †

What would the British or French governments, or our own people, have thought, if, after the Arbitration Treaties of 1911 were signed, the United States Government had proclaimed to its public through the general press that it invited discussion of the points to which the Senate afterward refused consent, and was indifferent whether they were accepted or not?

In conclusion, it is beneficial to observe that the summary ejectment of Colombia from property which she could not improve herself, and against the improvement of which by another she raised frivolous obstacles, is precisely in line with transactions going on all over the world; to the great distress of many worthy people who think that law should, or can, settle all matters, binding nations in links of iron. India, Egypt, Persia, Tripoli, Tunis, Algiers, Morocco, all stand on the same general basis as Panama. The world has needed them; and technical possession by legal prescription has fallen, still falls, and should continue

* *Moore's Digest,* vol. iii, p. 98.
† *Moore's Digest,* vol. iii, p. 96.

to fall, before the advance of the world, when the owners are unable or unwilling to improve or to confer security.

Law is a valuable instrument; invaluable is a more fitting word. But it is only an instrument, it is not a principle. It is a contrivance, a means; not an end. Man is not for law, but law for man. That France in eighty years' occupancy has raised the commerce of Algiers from one million dollars to two hundred millions; that in Tunis in thirty years the increase is from eight millions to forty millions, and that in the same time two thousand miles of good road have been built; the benefits done by Great Britain to Egypt—all these do not so much justify the new administrators in their original action as condemn the old as worthless cumberers of the ground, and therefore rightfully dispossessed. The horrified plea of legal possession violated is in such cases a mere figment of law. It illustrates what has been already said: that Law is a means, not an end; a good servant, but a bad master. So in Panama.

It is sometimes urged: Would the United States have acted thus in the case of a strong state? The question posed by the word "strong" is one not of right, to which this paper is limited, but of expediency. In 1911, France, Germany, and Great Britain, all strong states, maintained severally what each considered right; but their course was modified by expediency, formulated by diplomacy, and based upon armament. The reply to the query, however, is that necessity for such action rarely arises with strong states, if the word "strong" be correctly defined. A strong state is one that maintains habitually peace and security within its borders, and improves its possessions. Turkey, exclusive of nominal dependencies, has 27,000,000 people. Is Turkey a strong state? Holland has under 6,000,000, Belgium little over 7,000,000. Yet even Belgium has had occasion to notice that if sovereignty be abused in a matter of world concern—as in the Congo Free State—the world will call her to account. The Isthmus of Panama, because of its interoceanic possibilities, was and is a world concern, in so far that if there be maladministration the world will interfere. If the United States do not give good administration and security she will hear from the world, though she be a strong state.

A. T. Mahan.